

HUSSAIN (Migration) [2022] AATA 1875 (30 May 2022)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr JAWAD HUSSAIN
VISA APPLICANT:	Ms ANEELA
REPRESENTATIVE:	Mr Thong Ngoc Nguyen (MARN: 0322836)
CASE NUMBER:	1824384
DIBP REFERENCE(S):	BCC2017/3033231
MEMBER:	Russell Matheson
DATE:	30 May 2022
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211, cl.309.212 and cl.309.213 of Schedule 2 to the Regulations; and • cl.309.221 of Schedule 2 to the Regulations. •

Statement made on 30 May 2022 at 4:18pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine and continuing relationship – marriage arranged by parents – money transfers – applicant lives with the sponsor’s parents – periods of cohabitation – limited evidence of social activities – sound knowledge of each other’s living arrangements – decision under review remitted

LEGISLATION

*Migration Act 1958, ss 5, 65
Migration Regulations 1994, Schedule 2, cls 309.211-309.213, 309.221; r 1.15*

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 13 August 2018 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant (the applicant) is a female national of Pakistan born in February 1991. She applied for the visa on 23 August 2017 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309. 211 because the delegate was not satisfied the applicant is the spouse of the sponsor.
4. The Tribunal exercised its discretion to hold the hearing by video conference. The hearing was held during the COVID-19 pandemic. The Tribunal determined it was reasonable to hold a hearing by video conference, having regard to the nature of this matter and the individual circumstances of the applicant. The Tribunal also had regard to the Tribunal's objective of providing a mechanism of review that is fair, just, economical and quick, and the delay to the matter if the hearing was not to be conducted by video conference. The Tribunal is satisfied that the applicant and review applicant were given a fair opportunity to give evidence and present arguments.
5. The review applicant (sponsor) appeared before the Tribunal on 9 March 2022 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant.
6. The review applicant was represented in relation to the review. The representative attended the Tribunal hearing.
7. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

CONSIDERATION OF CLAIMS AND EVIDENCE

8. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act.
9. The Tribunal has before it the Departmental file relating to the applicant and its own file. The sponsor did not provide a copy of the Department's decision to the Tribunal.
10. The evidence the parties provided to the Tribunal is recorded throughout this decision record. _

Whether the parties are in a spouse or de facto relationship

11. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an

Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.

12. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

13. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant provided a copy of the Marriage Registration Certificate issued by the Government of Khyber Pakhtunkhwa, Pakistan on 16 June 2016. There is no evidence before the Tribunal to indicate the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
14. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below, the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.
15. The Tribunal had the benefit of the sponsor's and applicant's oral evidence. The Tribunal gave all the evidence provided by the parties at the Tribunal hearing and the information contained in the Departmental and Tribunal files due regard. The Tribunal considered evidence given by the parties to be consistent, persuasive and overall credible.

Are the other requirements for a spouse relationship met?

16. Financial aspects

17. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses and any combined future financial commitments or plans.
18. The sponsor gave evidence that he has been financially supporting the applicant since their marriage in 2016. He further stated that the applicant utilised the money sent for her day-to-day living expenses and study. The parties stated that they have a joint bank account with the Bank of Khyber in Pakistan and the sponsor deposits money into the joint account. The parties provided copies of bank statements indicating money transfers from the sponsor to the joint account and a letter from the Bank of Khyber as to the authenticity of the joint account. The sponsor also provided numerous money transfer receipts of transferring significant amounts of money to the applicant over a reasonable period of time. The parties

claimed that they would continue to pool and share their financial resources if the applicant is granted her visa and able to live with her husband in Australia.

19. The applicant stated that she was working as a physiotherapist and deposited her wages into her personal account prior to marrying the sponsor. She is not working at the moment and is she currently doing charity work and will seek employment in her profession and continue her studies in Australia.
20. The sponsor and applicant displayed through oral evidence a sound knowledge of each other's current and previous employment, income, hours/days worked and rental payments.
21. There is no evidence before the Tribunal of there having been any wills made listing the other as a beneficiary nor any evidence as to their being nominated as a beneficiary of the other's superannuation.
22. Acknowledging that the parties have always lived in different countries and continue to do so at the time of this decision, the Tribunal is not concerned that the extent of their financial commitment is limited in terms of their shared finances and plans.
23. In their circumstances, the Tribunal is satisfied that the parties share finances in a manner commensurate with their own personal situations at this time. That is, the sponsor, who resides in Australia, continues to support the applicant who resides with his family in Pakistan.
24. The parties have no joint liabilities or major assets. There is limited evidence before the Tribunal to indicate that the parties share or pool their financial resources. There is no evidence before the Tribunal that one person in the relationship owes any legal obligation in respect of the other. There is limited evidence before the Tribunal to support that the parties share day-to-day living expenses or pool their financial resources.
25. The Tribunal accepts there is a degree of difficulty in establishing and sharing financial resources when the sponsor and applicant live in separate countries. The Tribunal finds, based on the evidence before it, that the sponsor has provided limited significant financial support to the applicant. The Tribunal places limited weight on this aspect of the relationship.

26. Nature of the household

27. The Tribunal has considered the nature of the household including any joint responsibility for the care and support of children, if any, living arrangements of the parties and the sharing of the responsibility for housework.
28. The parties claim to have known each other since childhood as they were from the same village in Pakistan. The applicant gave evidence that she lives with the sponsors parents in Pakistan, and she shares the household duties with other members of the sponsors family. She further stated that she intends to share the household duties and responsibilities with the sponsor when she comes to Australia. The parties gave evidence that they have never been in another relationship and there are no children from their relationship. The sponsor stated that he is currently living on his own in Australia. The applicant had a sound knowledge of the sponsor's current and previous living arrangements.
29. Again, as the parties have resided in separate countries since the commencement of the relationship in 2016, the ability to provide evidence of a shared household can be difficult.
30. Having considered the above evidence carefully, the Tribunal is satisfied that, in circumstances where they have a limited ability to share a household in person, the Tribunal

acknowledges that the sponsor has travelled to visit the applicant on three occasions since their marriage. The sponsor gave evidence that he would have travelled on more occasions to visit the applicant if it had not been for COVID-19 and his limited ability to travel due to starting his own car detailing business. The parties provided a limited number of photographs in a family and household environment in Pakistan when the sponsor visited the applicant.

31. The applicant and sponsor in their written submissions and oral evidence gave detailed and consistent evidence about their living arrangements and the Tribunal found them persuasive, genuine and credible. The Tribunal is satisfied that the parties live together when the sponsor visits Pakistan. The parties provided evidence of sharing the household duties and responsibilities and individual tasks in detail that were culturally based. They have provided consistent evidence of their living arrangements and details about their daily lives, employment, income, work hours, health issues and limited social activities with family and friends.
32. Having considered the above evidence carefully, the Tribunal is satisfied that, in circumstances where they have a limited ability to share a household in person they have made the best of their current situation living in separate countries.
33. Based on the limited evidence above, the Tribunal is satisfied that the applicant and sponsor have resided together as spouses in Pakistan and they have future plans to reside together as spouses in Australia.
34. Based on the oral evidence of the sponsor and statements presented by the parties, the Tribunal accepts that they live together and have established a joint household together and that they share the responsibility for the housework when the sponsor visits the applicant in Pakistan. The Tribunal places limited weight on this aspect of the relationship.

35. Social aspects

36. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
37. The parties provided a limited number of photographs to the Department and Tribunal that they considered to be of their wedding and social activities when the sponsor visited Pakistan. These photographs show the applicant dressed in wedding attire and in the company of family and a select group of friends. Several of these photographs have third parties present. However, there are no photographs showing the parties signing the Nikkah Nama, which is considered the binding contract and a fundamental element of an Islamic marriage, which outlines the rights, and responsibilities of the groom and bride or other parties involved in marriage proceedings or a marriage ceremony having taken place. The parties also claim that the Rukhsati (sending off ceremony) took place in September 2018, when the sponsor visited the applicant in Pakistan. The parties claim that 200 people attended the Rukhsati ceremony. The Tribunal questioned the parties why they have not provided more photographic evidence of these significant cultural events and their social activities. The parties replied that they are from a strict conservative culture and to video or take photos at the Nikkah Nama and Rukhsati without permission is not permitted. The parties claim to have travelled to Kalam and Peshawar for their honeymoon and their relationship is supported by both their families. The Tribunal has concerns regarding the limited evidence presented of these significant cultural events occurring as stated by the parties.

38. The parties provided a number of 888 declarations to the Department and Tribunal. These declarants indicate they know the parties and were present at the time of marriage and as witnesses in Australia and attended the Rukhsati in Pakistan. They indicate that they believe the parties are in a genuine and continuing relationship but give no real insight into the inception and the development of the relationship over time. The Tribunal places little weight on the statements as convincing evidence of the social aspects of the claimed relationship.
39. The parties provided limited photographic evidence of their social activities in the primary application and to the Tribunal. Although the parties have provided limited evidence that demonstrates the social aspects of their relationship, the Tribunal found the sponsor's and applicant's oral evidence persuasive and genuine at the hearing.
40. On balance, the Tribunal accepts the applicant and the sponsor plan and undertake social activities when together. The Tribunal is satisfied that the parties represent themselves to family, friends and other people as being in a marital relationship. The Tribunal is satisfied that family, friends and relatives view the relationship as a genuine and committed one.

41. Commitment

42. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length and time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
43. The applicant and sponsor claim to have known each other since childhood living in the same village and that their marriage was arranged by their parents. The parties were married in January 2016 via proxy over the phone with the approval of both families. The parties provided a copy of their Marriage Registration Certificate issued by the Government of Khyber Pakhtunkhwa, Pakistan in June 2016. The Tribunal accepts the parties are lawfully married and have been in a relationship for over six years.
44. The parties presented documentary evidence of continued daily contact during periods of separation and a sound knowledge of each other's lives, family, living arrangements, health issues, personal history and future together. The evidence of communication between the parties is significant and the Tribunal considers the parties' knowledge of one another and their everyday concerns is a function of this communication. The parties also provided individual statements attesting to the genuineness of their relationship and their belief of it being a long-term one and their wish to start a family together and purchase their own home. The applicant also expressed her desire to continue her studies and professional development so that she could be gainfully employed in her profession in Australia. The Tribunal places significant weight on the statements provided and oral evidence given.
45. The Tribunal is satisfied that the parties see their relationship as stable, mutually supportive and a long-term one. The Tribunal considers their evidence with regard to their commitment to each other plausible, persuasive and genuine.
46. The Tribunal is satisfied the applicant and the sponsor provide each other with a degree of companionship and emotional support that is commensurate with a couple being in a genuine and continuing relationship. The Tribunal is satisfied the couple view their relationship as a long-term one.
47. The Tribunal is satisfied, having regard to the totality of the circumstances and the evidence provided that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied their relationship is a genuine and continuing relationship and that they do not live separately and apart on a permanent basis.

48. Findings

49. On the basis of the above, the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
50. Given these findings, the Tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a spousal relationship. Therefore, the visa applicant meets cl.309.211(2) and cl.309.221.
51. There is no evidence before the Tribunal that the spouse of the applicant is prohibited from being the sponsor of the applicant. The Tribunal is satisfied that the sponsor at the time of the visa application was an Australian citizen who had turned 18. Therefore, the applicant meets cl.309.212 and cl.309.213.
52. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

53. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309. 211, cl.309.212 and cl.309.213 of Schedule 2 to the Regulations; and
 - cl.309.221 of Schedule 2 to the Regulations.

Russell Matheson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).